Even in the case of States, which are authorized by the people of the United States to exercise large sovereign powers, including that of legislation, it has been determined that constitutional conventions have no legislative powers except those expressly delegated, or necessarily impliable; *Quinlan* v. *Houston etc. Ry. Co.* (Tex. 1896) 34 S. W. 738; *Wells* v. *Bain* and *Wood's Appeal* (1874) 75 Pa. 39, 59; *Ex parte Birmingham etc. Ry. Co.* (Ala. 1905) 42 So. 118; Jameson, Const. Conv. Secs. 420 *et seq.*; 72 Amer. Dec. 78 n., for they are normally invested merely with deliberative powers. This is now well settled, although only after a struggle. Ill. St. Reg. of January 10 and 17, 1862; Deb. N. Y. Conv. 1821, p. 105; Deb. Ky. Conv. 1849, p. 863. It follows that in a territorial convention there resides no right to legislate, except as granted expressly or by necessary implication in the Enabling Act, since it has been shown that there is no source from which the rights to exercise sovereign powers in a territory may be drawn except from congress. If this be true, the question resolves itself into one of interpretation of the Enabling Act. Nowhere therein is there an express provision for such legislation as that indulged in by the convention. Legislative power in a convention is, as has been pointed out, an extraordinary power, and to authorize its exercise by implication, that implication should be clear and unquestioned. The differing opinions of the judges in the principal case show that it was not unquestioned, and upon examination of the act, the implication seems exceedingly doubtful. Admitting that the convention had authority to divide established counties, it does not follow that this division was to have any effect in actually creating a division before ratification. Nor, admitting that the provisions of the Enabling Act authorizing the election of officers at the same time as a submission of the constitution, authorized the recognition of the proposed divisions for the purposes of election, does it follow that authority must necessarily be implied therefrom to legislate for the appointment of election officers, for, as pointed out by Burwell, J., although it might be inconvenient for one set of officers to take charge of three sets of elections, it would not be impossible.

THE EFFECT OF THE RULE OF MUTUALITY OF EQUITABLE RELIEF ON SPECIFIC PERFORMANCE BY INJUNCTION.—The question has been rarely considered as to the availability of the defense of lack of mutuality to cases of specific performance by injunction. This form of relief has been granted on several theories; first, the relief is made to depend upon the same principles as those of specific performance; *Dills* v. *Doebler* (1892) 62 Conn. 366; *South Chicago Ry. Co.* v. *Ry. Co.* (1898) 171 Ill. 391; *Welty* v. *Jacobs* (1898) 171 Ill. 614; second, mere breach of an express negative covenant, regardless of other circumstances, is sufficient; *Donnell* v. *Bennett* (1883) L. R. 22 Ch. Div. 835; *Andrews* v. *Kingsbury* (1904) 212 Ill. 97; 7 COLUMBIA LAW REVIEW 204; third, the courts act upon the practical distinction between affirmative and negative relief, one compelling action, often not supervisable, the other compelling inaction, always supervisable. The rule often takes the form that if the relief "will do substantial justice between the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and there is no reason of policy against it, the

court will interfere to restrain conduct which is contrary to the contract, although it may be unable to compel specific performance of it." *Singer Co.* v. *Union Co.* (Fed. 1873) 1 Holmes 253. Fourth, relief may be granted against the breach of an affirmative promise which is incapable of specific performance by an affirmative decree. *Lane* v. *Newdigate* (1804) 10 Vesey Jr. 192. This rule is a mere subterfuge and unsupportable. *Ryan* v. *Mut. Association* (1893) 1 Ch. 116, 124. Under the first theory, the rule as to lack of mutuality is clearly applicable, and under the second, clearly inapplicable. The statement of the third rule is so broad as to be useless. On its face it discloses no trace of the rule of mutuality as a rule, but it is simply a statement that equity will act fairly. Though possibly primarily intended to merely maintain a *status quo, Western Union &c., Co.* v. *Penn Co.* (1904) 129 Fed. 849, it has been given a broader scope, and in some jurisdictions, as in New York, seems to have practically limited the rule of mutuality to affirmative covenants. *Western Union &c., Co.* v. *Ry. Co.* (1880) 3 Fed. 423; *Chicago &c., Ry. Co.* v. *R. R. Co.* (1885) 24 Fed. 516; *Standard Fashion Co.* v. *Siegel Cooper Co.* (1898) 157 N. Y. 60; *American &c., Co.* v. *Varley Co.* (1904) 26 R. I. 295; *Brush-Swan Co.* v. *Brush Electric Co.* (1890) 41 Fed. 163. This rule as applied, seems not an exception to, but a judicial repeal of, the rule of mutuality, see *Bickford* v. *Davis* (1882) 11 Fed. 529, and often results in the enforcement of the doctrine of *Lane* v. *Newdigate, supra.* Upon principle it would seem inapplicable to many cases if the rule of mutuality still obtains, see *Suburban &c., Co.* v. *Nangle* (1897) 70 Ill. App. 384, 394; *Standard Fashion Co.* v. *Siegel Cooper Co., supra,* in 30 App. Div. 564, 573, as apparently it does obtain to a certain extent even in jurisdictions applying the broader rule. See *Beck* v. *Ind., &c., Co.* (1905) 36 Ind. App. 600.

Since the rule as to mutuality in its history and application applies generally to cases of specific performance, the form of relief would seem immaterial. *Welty* v. *Jacobs, supra.* Whether the measure of its operation be a narrow balancing of the particular reliefs obtainable on each side or a broader consideration of the relative positions of the parties, there would seem no magic in the promise being negative. If this be so, two considerations enter into a determination of whether injunctive relief should be granted: first, the relation of the negative promise to the whole contract; second, the rule that equity will not do indirectly what it cannot do directly. *Welty* v. *Jacobs, supra.* If the contract on the defendant's side is passive, primarily intended to insure inaction, injunctive relief should directly depend upon the rule of mutuality, just as if affirmative relief on the positive promise, if mechanically enforcible, were demanded. If the contract is active, however, the defendant's promises looking primarily to his action, and the negative promises simply superadded as precautionary, injunctive relief should depend upon whether the defendant's positive or negative promises are correlative. Cf. *Donnell* v. *Bennet, supra.* Assume the affirmative promises mechanically unenforcible, or mechanically enforcible but unenforcible because of the operation of the rules as to mutuality. If the promises are correlative, e. g., to sell to complainant and to no one else, the principle of indirect enforcement in fact in the first case, coupled with the rule of mutuality in the second case, should bar injunctive relief.

If the promises are non-correlative, no indirect enforcement results, the rule of mutuality seems inapplicable and the injunction should issue if the remedy at law be inadequate. Where the question of the contract being active or passive is doubtful, equity should not act if the relief depends upon a decision of this point.

In these cases the rule of mutuality may often be avoided by the use of a conditional decree, continuance of the decree being conditional upon the continued performance by the complainant. *Stocker* v. *Wederburn* (1857) 3 K. & J. 393. Such a decree should only be granted where performance by the complainant and defendant are concurrent. If performance by the defendant is a condition precedent to performance by complainant the rule of mutuality applies fully, whereas if performance by the complainant is a condition precedent to performance by defendant, an absolute decree is the proper one. *Petrolia Mfg. Co.* v. *Jenkins* (1898) 51 N. Y. Supp. 1028. The condition annexed, however, must be a simple one to render the decree feasible. Such has been the case except in the Railroad cases. *Standard Fashion Co.* v. *Siegel Cooper Co., supra; McCaull* v. *Braham* (1883) 16 Fed. 37. Moreover, if the contract be so complex or peculiar that it would be difficult to determine whether it had been broken, or the condition of the decree violated, or if such a discretion is by the contract left in the party that the decree may be effectively nullified, a conditional decree is improper. *Pullman Co.* v. *Ray Co.* (1882) 11 Fed. 625; *Iron Age &c. Co.* v. *Telegraph Co.* (1883) 83 Ala. 498. In a recent Federal case an injunction was asked against the continued breach of the defendant's negative promises in a partly performed fifteen-year bilateral contract, containing positive (to manufacture, supply and buy) and negative (not to compete, &c.) promises on both sides. On demurrer to the original bill, the court held that the rule of mutuality barred the relief, but on demurrer to the amended bill quoted 6 Pom. Eq. Juris. Sec. 775, in favor of a conditional decree. The contract was exceedingly complex, provided for the supply of the goods with "reasonable business promptness," at the lowest price they were sold to others, less a varying discount, with provisions for "reasonable directions," and goods "adapted to the purpose for which they are required," &c. *General Electric Co.* v. *Westinghouse Co.* (1907) 151 Fed. 664. Under the foregoing rules, an absolute decree would seem improper, as the affirmative promises were not specifically enforcible, the positive and negative promises were correlative, and the contract not clearly passive. A conditional decree moreover would seem peculiarly open to the suggestion above. An absolute injunction might have been granted on the independent grounds of protection of patent rights and multiplicity of suits.